Supreme Court, U. S.
FILED
OCT 3 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1455

UNITED STATES OF AMERICA,
Petitioner,

v.

EDGAR H. GILLOCK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR EDGAR H. GILLOCK

JAMES F. NEAL
JAMES V. DORAMUS
JAMES F. SANDERS
NEAL & HARWELL
800 Third National Bank Bldg.
Nashville, TN 37219

HAL GERBER
GERBER, BERNSTEIN, GERBER & WINESTONE
3121 100 North Main Bldg.
Memphis, TN 38103

Counsel for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

TABLE OF AUTHORITIES ii

OPINION BELOW AND JURISDICTION 1

COUNTER-STATEMENT OF QUESTION PRESENTED 1

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED 2

COUNTER-STATEMENT 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

THE FUNDAMENTAL IMPORTANCE OF THE LEGISLATIVE SPEECH OR DEBATE PROTECTION IN GUARANTEEING THE INDEPENDENCE OF LEGISLATORS IN A REPUBLICAN FORM OF GOVERNMENT REQUIRES THAT EVIDENCE OF A STATE LEGISLATOR'S LEGISLATIVE ACTS BE EXCLUDED FROM EVIDENCE IN A FEDERAL CRIMINAL PROCEEDING AGAINST THAT LEGISLATOR 7

1. The Long History Of This Court's Recognition Of Those Principles Embodied In The Speech Or Debate Protection Requires, Under Rule 501 Of The Federal Rules Of Evidence, That A Legislative Privilege Be Applied So As To Bar Proof Of A Defendant State Legislator's Legislative Acts In A Federal Criminal Trial 7

A. The Federal Common Law Recognizes The State Legislative Speech Or Debate Privilege 12

B. The Government's Arguments That A State Legislative Speech Or Debate Protection Does Not Exist Is Contrary To The Weight Of Experience And Authority 16

(1) "Immunity," "Official Immunity," and the Speech or Debate Protection 17

(2) Separation of Powers 27

Page

(3) The Common Law Does Not Reflect A "Measured Hostility" Towards Privileges 29

C. The Conclusion Must Be Drawn That The Common Law Recognizes The Speech Or Debate Protection 30

D. The Federal Common Law Speech Or Debate Protection Must Be Applied, Through Rule 501, In A Federal Criminal Proceeding Against A State Legislator 31

2. Principles and Considerations Deeply Rooted In The Anglo-American Form Of Representative Democracy, The Concept Of Federalism, And In The Constitution, Require Recognition And Application Of The Speech Or Debate Protection In A Federal Criminal Prosecution Of A State Legislator 38

CONCLUSION 44

TABLE OF AUTHORITIES

CASES:

Baker v. Carr, 369 U.S. 186 (1962) 40

Barr v. Matteo, 360 U.S. 564 (1959) 26, 27

Blau v. United States, 340 U.S. 332 (1950) 20

Bond v. Floyd, 385 U.S. 116 (1966) 23

Boyd v. United States, 116 U.S. 616 (1886) 37

Branzburg v. Hayes, 408 U.S. 665, 688 (1972) 8

Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La.) *aff'd sub. nom.*, Denney v. Bush, 367 U.S. 908 (1961) 23

Chinac v. Reinicker, 11 Wheat 280 (1826) 20

City of Safety Harbor v. Birchfield, 529 F.2d 1251 (5th Cir. 1976) 10

Coffin v. Coffin, 4 Mass. 1, 27, 3 Am. Dec. 189 (1808) .. 26

Page

Doe v. McMillan, 412 U.S. 306 (1973) 25, 26

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) 21, 22, 23, 31

Elkins v. United States, 364 U.S. 206 (1960) 29

Fletcher v. Peck, 6 Cranch 87, 130 11

Fry v. United States, 421 U.S. 542 (1975) 42

Herbert v. Lando, No. 77-1105 (April 18, 1979) 20

Imbler v. Pachtman, 424 U.S. 409 (1976) 25, 33

In re Grand Jury Proceedings, 563 F.2d 577 (3rd Cir. 1977) 10

In re Neagle, 135 U.S. 1 (1890) 24

Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963) ...22, 23

Lake Country Estate, Inc. v. Tahoe Regional Planning Agency, —— U.S. ——, 59 L.Ed.2d 401 (1979) ..*passim*

Lawn v. United States, 355 U.S. 339 (1958) 20

Liveright v. Joint Committee of the State of Tennessee, 279 F.Supp. 205 (M.D. Tenn. 1968) 22

Luther v. Borden, 48 U.S. (7 How.) 1 (1849) 40

Mapp v. Ohio, 367 U.S. 643 (1961) 20, 43

Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926) 41

Miranda v. Arizona, 384 U.S. 436 (1966) 20, 33

Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958) 20

National League of Cities v. Usery, 426 U.S. 833 (1976) 42, 43

Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) *aff'd*, 418 U.S. 683 (1974) 26

O'Shea v. Littleton, 414 U.S. 488 (1974) 24, 26

Powell v. McCormack, 395 U.S. 486 (1969) 21

Roviaro v. United States, 353 U.S. 53 (1957) 8, 32

Scheuer v. Rhodes, 416 U.S. 232 (1974) 25

Stambler v. Willis, 415 F.2d 1365 (7th Cir. 1969) *cert. denied*, 399 U.S. 929 (1970) 21

Page

Tenney v. Brandhove, 341 U.S. 367 (1951) .....*passim*

Texas v. White, 74 U.S. (7 Wall) 700 (1868) 41

United States v. American Telephone and Telegraph Company, 551 F.2d 384 (D.C. Cir. 1976) 22

United States v. Anzelmo, 319 F.Supp. 1106 (E.D. La. 1970) 26

United States v. Bass, 404 U.S. 336, 349 (1971) 43

United States v. Brewster, 408 U.S. 501 (1972) ....*passim*

United States v. Calandra, 414 U.S. 338 (1974) 20, 30

United States v. Craig, 528 F.2d 773 (7th Cir. 1976), *cert. denied,* 425 U.S. 973, reversed, 537 F.2d 957, *cert. denied,* 429 U.S. 999 .....*passim*

United States v. DiCarlo, 565 F.2d 802 (1st Cir. 1977) 9

United States v. Gillock, 587 F.2d 284 (6th Cir. 1978) 2, 5, 8, 9, 28

United States v. Helstoski, No. 78-349 (June 18, 1979) .....*passim*

United States v. Isaacs, 493 F.2d 1124 (7th Cir.) *cert. denied,* 417 U.S. 976 (1974) 26

United States v. Johnson, 383 U.S. 169 (1966) .....*passim*

United States v. Nixon, 418 U.S. 683 (1974) 20

United States v. United States District Court, 407 U.S. 297 (1972) 36

United States v. Watkins, 354 U.S. 178 (1957) 22

Weems v. United States, 217 U.S. 349 (1910) 35

Younger v. Harris, 401 U.S. 37 (1971) 42

Zacker v. United States, 227 F.2d 219 (8th Cir. 1955) .. 20

CONSTITUTIONS, STATUTES AND RULES:

United States Constitution
Tenth Amendment 40, 41, 42, 43
Eleventh Amendment 40, 41

Page

Article I, Section 6, cl. 1 (Speech or Debate Clause) .....*passim*

Article IV, Section 4 .....2, 5, 40

Article VI, cl. 2 (Supremacy Clause) 2, 43

Alaska Constitution
Article II, Section 6 10

Hawaii Constitution
Article III, Section 8 10

Hobbs Act, 18 U.S.C. § 1951 2

Travel Act, 18 U.S.C. § 1952 2

18 U.S.C. § 1962 2

42 U.S.C. § 1983 39

Fed. R. Evid. 501 .....*passim*

Fed. R. Crim. P. 12 2

Iowa Code Section 2.23 (1967) 10

North Carolina Code Section 120-9 (1974) 10

English Bill of Rights, 1 Will. & Mary Sess. 2, Ch. II, Article 9 (1688) 13

MISCELLANEOUS:

90 Harv. L. Rev. 1133 (1977) 38

Holdsworth, *A History of the English Law* (Little Brown & Co. 1938) 13

Note, *Evidentiary Implications of the Speech or Debate Clause,* 88 Yale L.J. 1280 (1979) 36

Notes of the Committee on the Judiciary, H. R. Rep. No. 93-650, 93rd Cong. 2d Sess., 4 U.S. Code Cong. and Admin. News 7075, 7082 (1974) 10

Story, *Commentaries on the Constitution of the United States* (Boston, Hilliard, Gray and Co. 1833) 14

Tucker, *The Constitution of the United States* (Callaghan & Co. 1899) 14

Works of James Wilson (Andrews ed. 1896) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1455

UNITED STATES OF AMERICA,
Petitioner,

v.

EDGAR H. GILLOCK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR EDGAR H. GILLOCK

OPINION BELOW AND JURISDICTION

The Government has correctly cited the Opinions Below and has correctly stated the jurisdiction.

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the necessity for protection of legislative speech or debate in a republican form of government requires a limited evidentiary privilege, excluding evidence of a state legislator's legislative acts in a federal criminal prosecution.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

In addition to those constitutional provisions set forth in the Government's Brief, respondent would add Article IV, Section 4, of the United States Constitution.

> The United States shall guarantee to every state in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

COUNTER-STATEMENT

This case arises out of the federal prosecution of a Tennessee State Senator, Respondent Edgar H. Gillock, under the Hobbs Act (18 U.S.C. § 1951), the Travel Act (18 U.S.C. § 1952),[1] and the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962), and the Government's appeal from a pre-trial order by the United States District Court for the Western District of Tennessee suppressing certain evidence proffered by the Government in that prosecution. The Trial Court's order has been affirmed, in substantial part, by the United States Court of Appeals for the Sixth Circuit, *United States* v. *Gillock,* 587 F.2d 284 (6th Cir. 1978), and the Government appeals from that ruling.

Although the Government has included a rather lengthy narrative of its view of the proof,[2] the resolu-

[1] The Travel Act Count, Count Two, was dismissed for failure to state an offense (Rule 12, Federal Rules of Criminal Procedure) and, consequently, is not before this Court.

[2] Senator Gillock has not had the opportunity to confront witnesses or present evidence in his own behalf and thus the recitation

tion of the issue in this case does not require reference to any fact other than whether the following evidence should be admissible in a federal criminal trial of a state senator:

1. The State Senator "made an official request in writing for an opinion from the [Tennessee] Attorney General concerning 'Extradition on a Misdemeanor.' . . ." (Pet. App. 43a).
2. The State Senator "participated in a hearing conducted by the Senate Judiciary Committee, of which he was a member in the Tennessee Senate" and an extradition officer in his role as a head of the Tennessee Law Enforcement Academy (a position different and distinct from his position as a hearing officer), appeared before the committee on a matter concerning the budget of the Tennessee Law Enforcement Academy. (Pet. App. 45a).
3. The State Senator "introduced Senate Bill Number 1783 . . . ." and sponsored successive bills and amendments. (Pet. App. 47a-48a). Moreover, the Government intends to introduce "[a]ny and all statements [which were] made by the defendant in support of the bill or bills, and the amendment thereto recorded in the normal course of business of the Tennessee General Assembly." (Pet. App. 48a).
4. The State Senator's vote to override the Governor's veto and "[a]ny and all statements made by the defendant in support of his motion to override the veto [which] were recorded in the normal course of business of the Tennessee General Assembly. . . ." (Pet. App. 49a).

in the statement is nothing more than an untested and generalized characterization of the Government's proof, in the light most favorable to the Government. Neither party has raised any factual issue relating to the Government's charges before this Court.

Having previously ruled that the respondent was not immune from federal prosecution by virtue of his status as a state legislator (A. 16-17), the District Judge granted his motion to suppress at trial the evidence of respondent's "legislative acts or motivation therefor." (Pet. App. 65a-74a). The basis for this ruling was the Court's recognition of the common law speech or debate privilege, enshrined in the Speech or Debate Clauses of both the United States and Tennessee Constitutions and equivalent in scope thereto, and the application of that privilege through Rule 501, Federal Rules of Evidence. The District Court specifically found that the protection afforded by that privilege

> is necessary, to paraphrase Chief Justice Berger in the *Brewster* case, to protect the integrity of the legislative process by insuring the independence of individual legislators, not simply for the personal or private benefit of legislators. . . . Such freedom of our state legislators from federal criminal prosecutions, which call into question their legislative acts and motives, is necessary to preserve the constitutional relation between our federal and state governments in our federal system.

(Pet. App. 73a)

Following an appeal therefrom by the Government, a remand from the Court of Appeals for specific findings on particular items of evidence (Pet. App. 56a-58a), a tender of proof by the Government (Pet. App. 39a-51a) and renewal of the motion to suppress, the District Court granted, on the same grounds, the motion with respect to each of the items of evidence described above, as well as several additional items. (Pet. App. 59a-64a). The District Court held that the scope

of this federal common law privilege was co-extensive with that guaranteed a federal legislator. (Pet. App. 59a-64a).

On the Government's second appeal, the United States Court of Appeals for the Sixth Circuit, with one Judge dissenting, affirmed the District Court's recognition in this case pursuant to the provisions of Rule 501. Tracing the "long history and felt need for protection of legislative speech or debate and the repeated and strong recognition of that history . . ." in cases decided by this Court, the Court of Appeals concluded that the District Judge was justified ". . . in his protection of that privilege." (Pet. App. 15a), *United States* v. *Gillock,* 587 F.2d 284, 290 (6th Cir. 1978).

In reviewing, under this Court's Speech or Debate Clause cases, the specific application of the protection to the facts at bar, the Court of Appeals likewise affirmed the District Court as to the items of evidence, set forth above, and reversed the District Court as to some items thus further limiting the scope of the privilege.

It is from the Court of Appeals' affirmance of the District Court's suppression of the evidence set forth above that the instant appeal by the Government is taken.

SUMMARY OF ARGUMENT

In what the United States Court of Appeals for the Sixth Circuit described as "the repeated and strong recognition" of "the long history and the felt need for protection of legislative speech or debate," *United States* v. *Gillock,* 587 F.2d 284, 290 (6th Cir. 1978), this Court has upheld the speech or debate protection

for federal legislators in both civil and criminal cases, *see United States* v. *Helstoski,* No. 78-349 (June 18, 1979); *United States* v. *Brewster,* 408 U.S. 501 (1972); *United States* v. *Johnson,* 383 U.S. 169 (1966), and for state legislators, indeed "regional legislators," in civil proceedings, *see Tenney* v. *Brandhove,* 341 U.S. 367 (1951); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* —— U.S. ——, 59 L.Ed.2d 401 (1979). Both the District Court and Court of Appeals below afforded that the same protection to the state legislator in this federal criminal prosecution in a natural, logical, and historically mandated extension of the foregoing holdings by this Court, grounded upon the same principles underlying those holdings.

The Government in this appeal seeks to have this Court carve out an exception to that time-honored principle, reaching back beyond our Constitution to the English Bill of Rights, which would wholly exclude *state* legislators charged in *federal criminal* prosecutions from the speech or debate protection. Although this Court has never decided the precise issue presented by the instant case, a wealth of precedent establishes the necessity for the privilege and its special value in our system of government.

Our opposition to the Government's unwarranted and draconian exception is in two parts. First, relying upon the decisions below and recent decisions of this Court, we contend that the speech or debate protection for state legislators in federal criminal cases not only exists, but has been recognized as essential in an unbroken line of decisions and, as such, is unquestionably an established part of the federal common law and, "interpreted in light of reason and experience," is applicable herein through Rule 501, Federal Rules of

Evidence. Second, we assert that, even apart from the operation of Rule 501, this legislative speech or debate protection occupies such an integral and hallowed place in our republican form of government, as a guarantor of legislative independence, that to abolish it in this context would do grave harm to the basic form of government we enjoy, the Constitution of the United States, and the concept of federalism. Thus, the fundamental protection upheld throughout our history and asserted in this case transcends Rule 501, both in concept and scope.

ARGUMENT

THE FUNDAMENTAL IMPORTANCE OF THE LEGISLATIVE SPEECH OR DEBATE PROTECTION IN GUARANTEEING THE INDEPENDENCE OF LEGISLATORS IN A REPUBLICAN FORM OF GOVERNMENT REQUIRES THAT EVIDENCE OF A STATE LEGISLATOR'S LEGISLATIVE ACTS BE EXCLUDED FROM EVIDENCE IN A FEDERAL CRIMINAL PROCEEDING AGAINST THAT LEGISLATOR.

1. The Long History Of This Court's Recognition Of Those Principles Embodied In The Speech Or Debate Protection Requires, Under Rule 501 Of The Federal Rules of Evidence, That A Legislative Privilege Be Applied So As To Bar Proof Of A Defendant State Legislator's Legislative Acts In A Federal Criminal Trial.

In light of the Government's characterization of the legislative protection asserted and upheld in this case, it is important to recognize at the outset that the protection at issue here is something more than an unfair advantage or a "privilege" for a single witness in a single case. Although a privilege may give an advantage to one party, and may even appear unfair in any particular case, the reason and experience of the law have

shown that in certain instances there are higher principles to be served than the right to every person's evidence. If a party is "protected by a constitutional, *common law* or statutory privilege," *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972) (emphasis added), these private rights may benefit the party (including the Government) asserting the right, but the privileges are designed "not for their private indulgence but for the public good." *Tenney* v. *Brandhove*, 341 U.S. at 377; *see Roviaro* v. *United States*, 353 U.S. 53, 59 (1957) ("the informer's privilege is in reality the Government's privilege....").

The "public good," beginning before the English Bill of Rights, and carried over into the Articles of Confederation, the Constitution of the United States, and the Tennessee Constitution, has always recognized the broad principle that legislators ". . . shall not be questioned in any other place" for "any speech or debate" in the legislative body. This fundamental republican guarantee may be implemented through Rule 501 in the instant case, but the guarantee is based on certain essential tenets of our form of government. Thus, it is not difficult to refute the Government's denial of the very existence of this basic speech or debate protection; and this denial is the essence of the Government's position in this case.

The logical starting point in refuting the Government's claims in this case is the Opinion of the Court of Appeals, reported in *United States* v. *Gillock*, 587 F.2d 284 (6th Cir. 1978). Having noted the historical antecedents of the Speech or Debate Clauses in the United States and Tennessee Constitutions, the Court of Appeals initially concluded that neither the federal

clause (respondent is a state legislator)[3] nor the state clause (by virtue of the federal supremacy clause) was directly applicable. The Court then restricted itself to the question of whether the speech or debate privilege, equivalent to that of Article I, Section 6, United States Constitution, should be recognized under Rule 501. *Id.* at 285-86.

In deciding that question, the Court began with a careful review of the history of legislative speech or debate clauses, with particular emphasis on this Court's treatment of the protection embodied therein, applied that history "in light of the American experience, and in the context of the American constitutional scheme of government. . . ." *United States* v. *Gillock*, 587 F.2d at 288. Noting its disagreement with the Seventh Circuit, *United States* v. *Craig*, 528 F.2d 773 (7th Cir. 1976), *cert. denied sub nom., Markert* v. *United States*, 425 U.S. 973 (1976) (Craig I); 537 F.2d 957 (7th Cir. 1976) *en banc* (Craig II), *cert. denied sub nom., Markert* v. *United States*, 429 U.S. 999 (1976), and with the First Circuit, *United States* v. *DiCarlo*, 565 F.2d 802 (1st Cir. 1977), the Court correctly concluded that "the long history and the felt need for protection of legislative speech or debate and the repeated and strong recognition of that history in the cases we have cited from the Supreme Court, fully justify our affirming [the] protection of the privilege in this case." *United States* v. *Gillock*, 587 F.2d at 290;

---

[3] *But see Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, —— U.S. ——, 59 L.Ed.2d 401, 415 (Blackmun J., dissenting).

see In re Grand Jury Proceedings, 563 F.2d 577 (3rd Cir. 1977).

The rationale of the Court of Appeals is borne out by recent decisions of this Court. For example, in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* —— U.S. ——, 59 L.Ed.2d 401, 412 (1979), this Court noted "the central importance attached to legislative freedom in our Nation;" independent of any statute or constitution,[4] state legislators have well established rights based on this "Court's interpretation of *federal* [*common*] *law.*" *Id.* (emphasis added). This common law principle, *see* Rule 501, Fed. R. Evid. "equally applicable to federal, state and regional legislators," *id.,* is that:

[4] Forty-three of the states have specific proviisons in their constitutions protecting the speech or debate privilege. *See Tenney* v. *Brandhove,* 341 U.S. 367, 375 n. 5 (1951); Alaska Const. Art. II § 6; Hawaii Const. Art. III § 8. Two states, Iowa and North Carolina specifically provide for the speech or debate privilege by statute. Iowa Code § 2.23 (1967), Gen. Stats. N.C. § 120-9 (1974). In addition, California, Mississippi, Nevada and South Carolina provide for a privilege from arrest for legislators. *Tenney* v. *Brandhove,* 341 U.S. at 375 n. 5. Only Florida has no specific constitutional or statutory provision concerning legislative privilege but the courts may recognize a common law privilege in that state. *See City of Safety Harbor* v. *Birchfield,* 529 F.2d 1251, 1256 n. 8 (5th Cir. 1976).

The Government suggests that this Court could adopt a rule "as broad as, but not broader than, that available in the Courts of [a defendant's] state." (Pet. Br. at 20 n. 2) Although the scope of the privilege is not at issue in this case, and even if it were, the Tennessee constitutional privilege is at least as broad as the federal rule, it would appear that any rule other than a general rule of national applicability would not foster Rule 501's goal of creating a "uniform standard." Notes of the Committee on the Judiciary, H. R. Rep. No. 93-650, 93rd Cong. 2d Sess., 4 U.S. Code Cong. and Admin. News 7075, 7082 (1974).

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader or to the hazard of the judgment against them based on a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck,* 6 Cranch 87, 130, that it was not consonant with our scheme of government for a Court to inquire into the motives of legislators, has remained unquestioned.

Id. at 412-13 (citations omitted). This clear statement of the common law surely establishes beyond doubt that there is a "principle of the common law" which allows legislators in a democratic society the greatest possible freedom to do and say things in connection with legislation without fear of being sued, indicted, or otherwise intimidated. *Id.; Tenney* v. *Brandhove,* 341 U.S. at 372.

The Government has sought to obscure this fundamental principle by its good faith assurances and a convoluted distinction between "privilege" and "immunity," apparently adapted from *Craig II, supra.* The real question, therefore, is not whether the common law recognizes the legislative speech or debate principle, but whether it should be interpreted in light of reason and experience to give a limited evidentiary privilege, excluding legislative acts in a criminal prosecution. There exists today, as there has existed for centuries, a "felt need" for the privilege in order to protect the independence of the legislature. Our strong tradition

of legislative independence is founded on common law origins which rival any other privilege recognized in the law, and the privilege exists not for the benefit of any individual legislator, but in the interest of the due functioning of our legislative system.

These fundamental principles of the common law should be the focus of this appeal, and are addressed first in this brief.

A. The federal common law recognizes the state legislative speech or debate privilege.

The protection afforded by the speech or debate principle is no less important in individual states than it is in the federal system. Because of the various express provisions in most states and in the federal Constitution,[5] as well as over four hundred years of "reason and experience," this Court has not often been asked to look to the existence, *vel non,* of the common law speech or debate principle simply "because the tradition of legislative privilege is so well established in our polity." *United States* v. *Johnson,* 383 U.S. 169, 179 (1966).

When this Court has considered this question in the past (and it has never considered this issue in the context of a federal criminal prosecution of a state legislator) there has been no doubt as to the existence of a federal common law speech or debate protection founded in the common law and sustained through centuries of "reason and experience." *Tenney* v. *Brandhove, supra; Lake Country Estates* v. *Tahoe Regional*

[5] *See* Note 4, *supra.*

Planning Agency, supra (extending a legislative privilege to "regional" legislators).

As this Court and other commentators have repeatedly noted, the speech or debate principle has its roots in English Parliamentary history where, as early as 1536, "the privilege of freedom of discussion was well recognized." Holdsworth, *A History of the English Law,* Vol. IV, p. 91 (Little, Brown & Co. 1938); *Tenney* v. *Brandhove, supra; United States* v. *Johnson, supra; United States* v. *Brewster, supra.*

After Peter Wentworth and others were sent to the Tower by Queen Elizabeth in 1587,[6] Parliament was harassed by successive monarchs and continued in its struggle with the Crown. In 1689 "[t]he various ways in which Charles II and James II had sought either to influence or to muzzle Parliament were dealt with by certain clauses in the [English] Bill of Rights [including the declaration] that freedom of speech and debate and proceedings in Parliament ought not be questioned in any court or place out of Parliament. . . ."[7] *Id.* at

[6] Wentworth and others had the audacity to sponsor the following rhetorical questions to Parliament:

> Whether this council be not a place for any member of the same here assembled, freely and without controllment of any person, or danger of laws, by bill or speech, to utter any of the griefs of this commonwealth whatsoever, touching the service of God, the safety of the prince and this noble realm? Whether that great honour may be done unto God and benefit and service unto the prince and state without free speech in this counsel, which may be done with it?

Holdsworth, *supra,* Vol. IV at 179.

[7] The Bill of Rights provided "[t]hat the Freedom of Speech and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament," 1 Wm. & Mary Sess. 2, cap. 2; *Tenney* v. *Brandhove,* 341 U.S. at 372.

Vol. VI, 231. *Craig I,* 528 F.2d at 776. Subsequently, and as a result of the English experience,

> [f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution.

Tenney v. *Brandhove,* 341 U.S. at 372; *see* Joseph Story, *Commentaries on the Constitution of the United States,* 307 (Boston, Hilliard, Gray and Co. 1833).[8] The "great and vital privilege" is freedom of speech and debate, "without which all other privileges would be comparatively unimportant, or ineffectual." *See* Tucker, *The Constitution of the United States,* 440 (Chi., Callaghan & Co. 1899). (The "precious privilege" prohibits a member from being "punished or questioned.")

On the basis of the universal acceptance of this principle, this Court has unmistakably identified the purpose of the common law speech or debate principle: "the reason for the privilege is clear;" it is that

[8] Story entertained no doubt as to the source of the clause, its relationship to the states, and its foundation in the common law:

> This privilege also is derived from the practice of the British Parliament, and was in full exercise in our colonial legislatures, and now belongs to the legislature of every state in the Union, as a matter of constitutional right. In the British parliament it is a claim of immemorial right . . . it is always particularly demanded of the king in person by the speaker of the house of commons, at the opening of every new parliament.

Story, *supra* at 309.

> in order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that *he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.*

Tenney v. *Brandhove,* 341 U.S. at 373, *citing* II Works of James Wilson (Andrews ed. 1896) 38 (emphasis added). (Wilson, according to *Tenney,* 341 U.S. at 373, was "an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution.") Moreover,

> It is apparent from the history of the clause that *the privilege was not born primarily of a desire to avoid private suits* such as those in *Kilbourn* and *Tenney,* but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary.

United States v. *Johnson,* 383 U.S. at 180-81 (emphasis added). This privilege is essential so that legislators may "execute the functions of their office *without fear of prosecutions, civil or criminal.*" *Tenney,* 341 U.S. at 374 (emphasis added).

Accordingly, there can be no meaningful quarrel with our threshold proposition that the federal common law recognizes a speech or debate principle, which exists primarily to protect legislators from prosecution for legislative acts. The basis and necessity for the protection, and for the privilege, are as compelling today as in the days of the founding fathers; in between is an unbroken history of reason and experience, acknowledged repeatedly by the courts, which establishes both the privilege and the continuing need for it.

B. The government's argument that a state legislative speech or debate protection does not exist is contrary to the weight of experience and authority.

In the face of the foregoing authority, the Government seeks not merely to bar application of this protection in criminal cases, but to persuade this Court that there is no legislative speech or debate protection for state legislators, that such a protection is "unwarranted" and "unprecedented." Thus, the Government *assumes* throughout that the courts below created the privilege, rather than simply recognizing it. In order to substantiate that argument and to circumvent the plain thrust of this Court's decisions, the Government has chosen, first, to posit an interdependent relationship between "immunity" and "privilege" and, through a rather convoluted process, argue that there is no "privilege" here because there is no "immunity."[9] Second, the Government chooses the least likely of the possible underpinnings for the privilege, "separation of pow-

[9] To avoid confusion, this brief will refer to the common law speech or debate *principle* or *protection*, leaving aside the characterization of the effect of the principle as a "privilege" or an "immunity." The Government repeatedly asserts the immunity-privilege relationship. *See* Pet. Br. at 27-28 ("[w]here there is no immunity, there is no derivative protection in the form of a privilege against proof of that act."); Pet. Br. at 31, ("because a state legislator has no immunity from federal criminal prosecution . . . neither logic nor precedent supports" our claim of privilege.); Pet. Br. at 31, ("But if in a particular proceeding there is no immunity, and liability could be imposed for legislative acts, then it would be utterly senseless to continue to recognize an evidentiary privilege designed to shelter a nonexistent immunity."); Pet. Br. at 38, ("the legislative acts of a state legislator enjoy no immunity from federal criminal prosecution comparable to those of a federal legislator, . . . no rational purpose is served by creating an evidentiary privilege against proof of such acts.")

ers," and mightily demolishes it, leaving undisturbed the real reasons for the application of the privilege in this case. Finally, the government ignores the interest to be weighed in this case, and seeks to destroy the privilege on the basis of a "measured hostility" toward privileges in general. The arguments will be discussed *seriatim*.

(1) "Immunity," "Official Immunity," and the Speech or Debate Protection.

The main thrust of the Government's argument appears to be its syllogistic comparison of "immunity" and "privilege," apparently embracing the theory, first advanced by Judge Tone in dissent in *Craig I, supra,* that "[w]here there is no immunity, it would be incongruous, if not useless, to recognize an evidentiary privilege." 528 F.2d at 782.[10] *See* Pet. Br. at 26-40. In search of support for this theory, the Government has scoured English, Canadian and American jurisprudence to no avail, adding nothing of import to Judge Tone's position. In the process, it has carefully avoided the logical, legal and historical considerations which deprive this novel theory of substance.

As we understand the Government's argument, its premise is that there can be no legislative privilege without an underlying legislative immunity. Inasmuch

[10] Judge Tone based his theory on the premise that "[t]he privilege against disclosure and the immunity from liability should also be commensurate when the basis for protection is common law official immunity" and concluded that the existence of the privilege "depends on whether there is an underlying immunity." 528 F.2d at 782. *Compare, Craig I,* 528 F.2d at 781-84 *with* Pet. Br. at 26-40.

as a state legislator enjoys no immunity from federal criminal prosecution, so the argument goes, that state legislator likewise has no legislative privilege in a federal criminal prosecution.

As support for the premise, the Government turns to the federal Speech or Debate Clause and this Court's decision in *United States* v. *Johnson, supra,* arguing that the *Johnson* decision demonstates, indeed requires a conclusion, that the evidentiary privilege is based upon and commensurate with the immunity. This interpretation of the decision in *Johnson* is clearly incorrect. Rather than basing the decision on the co-existence of an immunity and therefore a privilege, as the Government argues, this Court clearly distinguished between the Speech or Debate Clause's effect on immunity, as opposed to the exclusion of evidence by virtue of the privilege required by that Clause. *Id.* at 176-77. Indeed, the Court expressly reserved the question that the Government maintains was decided.

> We hold that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them. And, without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly

> drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.

Id. at 184-85. Thus, the Court has drawn the very distinction that the Government asserts it obliterated. The point missed by the Government is that the Court held not only that evidence of legislative acts must be excluded under the Speech or Debate Clause, but also that *part* of the charge itself was barred by the Speech or Debate Clause because it was based on legislative acts. *Id.* at 185. Similarly, the speech or debate protection asserted and upheld in the instant case distinguishes between exclusion of evidence and the dismissal of charges, inasmuch as these charges are not *based* on legislative acts. In short, *Johnson* actually supports the assertion of the protection and the scope given it by the Court of Appeals below.

Not only is the Government's premise devoid of support, it is fundamentally unsound. First, it assumes that a federal legislator has no Speech or Debate Clause privilege unless there is a corresponding immunity from federal criminal charges. The Government's argument, therefore, proves too much because the absence of criminal immunity for a federal legislator, *United States* v. *Brewster,* 408 U.S. 501 (1972), compels the conclusion that a federal legislator has no speech or debate privilege, a conclusion diametrically opposite to that reached in *United States* v. *Heltoski,* No. 78-349 (June 18, 1979), and one which would require Article I, Section 6, to be read out of the Constitution. Second, without any further analysis, it begs the question posed in this case and pre-supposes that respondent would not be entitled to the protection afforded in *United States* v. *Johnson, supra,* if any of

the instant charges were *based* on legislative acts. Third, the Government's argument depends on the erroneous legal proposition that evidentiary privileges exist only by virtue of an equivalent immunity. This is a misconception of privileges in general [11] and of the speech or debate privilege in particular. The protection required by the speech or debate principle is articulated in terms of not being "questioned in any other place;" it is therefore something more than civil [12] or criminal immunity and something more than an evidentiary privilege. The privilege, exclusion, or bar, depending on the context, emanates from the speech or debate principle, a principle derived from the Anglo-American reverence for a republican form of government and the need to guarantee the independence of the people's legislative representatives.

[11] As examples of privileges not derived from immunities, *see Miranda* v. *Arizona*, 384 U.S. 436 (1966) (Fifth Amendment); *Chinac* v. *Reinicker*, 11 Wheat 280 (1826) (attorney/client); *Blau* v. *United States*, 340 U.S. 332 (1950) (husband/wife); *Mullen* v. *United States*, 263 F.2d 275, 277-280 (D.C. Cir. 1958) (clergyman/penitent); *Zacker* v. *United States*, 227 F.2d 219, 226 (8th Cir. 1955) (recommendations to Attorney General as to litigation decision); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (unlawful searches and seizures).

[12] It is interesting to note that, in seeking to negate this broad protection by reliance on a perceived "measured hostility" to evidentiary privileges owing to the public's "right to every man's evidence," the Government relies heavily on decisions which did not address trial evidence and did not balance the same interests involved in this case, *see e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 701-02 (1974); *United States* v. *Calandra*, 414 U.S. 338 (1974) (exclusionary rule of Fourth Amendment inapplicable in grand jury proceeding); *Lawn* v. *United States*, 355 U.S. 339 (1958) (grand jury entitled to consider evidence obtained in violation of defendants' Fifth Amendment privilege against self-incrimination); *Herbert* v. *Lando*, No. 77-1105 (April 18, 1979) (editorial privilege in discovery proceedings).

In other words, the Government's "immunity" premise misses the point which should be at issue here; for that issue is the existence, *vel non,* of a speech or debate protection according to the principles of the common law, and the Government is taking one of the "effects" of that protection and seeking to make it a "cause."

For these reasons, the premise of the Government's basic argument is irrelevant and falls of its own weight. Its following arguments, then, attempting to demonstrate that state legislators have no "immunity" from federal criminal prosecution and that they thus have no evidentiary privilege in such prosecutions are of no consequence. A word should be said, however, about the Government's insertion of the "official immunity" concept and its comparison of federal and state official immunity.

Craig II presumes to differentiate the common law principle applicable to state legislators and the protections of the federal clause by suggesting that federal legislators enjoy a greater protection from civil injunctions. Even the Government does not wholeheartedly embrace this argument and notes only that state legislators are "apparently amenable to suits seeking injunctive relief . . . despite their official immunities." (Pet. Br. at 33). The efforts to obtain injunctions against federal legislators have only recently been rebuffed. *See Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975); *Powell* v. *McCormack,* 395 U.S. 486, 503 (1969); *Stambler* v. *Willis,* 415 F.2d 1365, 1368 (7th Cir. 1969), *cert. denied,* 399 U.S. 929 (1970). While it may be true that "once it is determined that members are acting within the 'legitimate legislative sphere' the speech or debate clause is an absolute bar

to interference" by a civil injunction, *Eastland* v. *United States Servicemen's Fund,* 421 U.S. at 503, the Government cannot possibly assume that federal legislators enjoy an absolute immunity from injunctions. "Although the power to investigate is necessarily broad it is not unlimited. Its boundaries are defined by its source," and the legislator may be enjoined when he steps outside the legislative sphere. *Id.* at 504 n. 15. *See United States* v. *American Telephone and Telegraph Co.,* 551 F.2d 384 (D.C. Cir. 1976).

The cases cited by the Government involving injunctions against state legislators do not suggest a different rule for state legislators. First, they were all decided prior to *Eastland* v. *United States Servicemen's Fund* and may well be subject to reversal under that case. Second, a careful examination of these cases discloses that different constitutional principles are involved for actions outside the "sphere of legislative activity" or where there is a conflict between federal constitutionally guaranteed rights and infringement of those rights by the legislature as an entire body. For example, in *Jordan* v. *Hutcheson,* 323 F.2d 597, 601 (4th Cir. 1963), and *Liveright* v. *Joint Committee of the State of Tennessee,* 279 F. Supp. 205 (M.D. Tenn. 1968), the federal courts were asked to enjoin state legislative investigatory subpoenas. Each court recognized that, as in *Eastland,* the legislative investigative power is not unbounded, and made the express determination that the matter sought to be enjoined was outside the sphere of legitimate legislative interests. In *Liveright,* Judge Miller implicitly recognized the federal common law speech or debate privilege. The Court applied *United States* v. *Watkins,* 354 U.S. 178 (1957), to determine the legitimate scope of the legislative privilege, and issued injunctive relief only after deciding that the defendant's actions were not within the privilege. *See Eastland* v. *United States Servicemen's Fund,* 421 U.S. at 503-07. *Jordan* v. *Hutcheson, supra,* turns on the same point. The Court states that

> the federal courts will recognize and respect the state's right to exercise through its legislature broad investigatory powers, nevertheless these powers are not unlimited and it remains the duty of the federal courts to protect the individual's constitutional rights.

323 F.2d at 601.

Bond v. *Floyd,* 385 U.S. 116 (1966) and *Bush* v. *Orleans Parish School Board,* 191 F. Supp. 871 (E.D. La), *aff'd sub nom. Denney* v. *Bush,* 367 U.S. 908 (1961) also involve extraordinary circumstances which warrant the interference of the federal system with state legislature as a body.

In *Bond* an injunction was directed by the federal court against the entire Georgia legislature, based on the legislator's right to be seated and take the oath of office. In *Bush* the action involves repeated, deliberate attempts by the legislature to thwart the desegregation of the Orleans Parish School Board in Louisiana.

None of these cases speaks to the issue of the application of a speech or debate privilege for an individual legislator. Upon close analysis, they display the restraint which courts have exercised in determining the scope of the privilege, and do not speak to the existence of the privilege. These cases all imply that there is a common law privilege, but that, as in the federal system, a court will not apply the privilege to those actions which are outside the scope of legitimate legislative activity.

If the Government's argument about immunity and privilege has any meaning at all, it must flow from Judge Tone's opinion that "the doctrine of official immunity leaves state legislators criminally liable under federal law for even their legislative acts." *Craig I,* 528 F.2d at 784; *see O'Shea* v. *Littleton,* 414 U.S. 488, 503 (1974) ("the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress....'" [13]

The validity of Judge Tone's opinion and the Government's derivative arguments rest on the erroneous assumption that there is a difference between the principles which inform the Speech or Debate Clause and the principles which support the common law speech or debate privileges. As we have amply demonstrated, *supra,* the various state and federal clauses merely codify one of the cardinal principles of the common law, and each continues to look to the common law for its definition, purpose and scope. *See Helstoski, supra; Brewster, supra; Johnson, supra.* Thus, if an immunity or a privilege arises under the clause, then it certainly applies with equal force to cases decided on the basis of federal common law.

Moreover, *Tenney* cannot be fairly limited to "official immunity." It is expressly grounded on those grand principles of legislative privilege which give life to the federal clause; and if *Tenney* had been a criminal case, these same principles would have justified an evidentiary privilege. Merely because *Tenney* did not ex-

[13] Official immunity does, of course, apply in some criminal actions, *see In re Neagle,* 135 U.S. 1 (1890).

pressly apply an evidentiary privilege (which would have been irrelevant in view of the civil immunity), is no basis for limiting the common law principle to civil cases.

Admittedly, there is a principle of law—official immunity—which insulates certain public officials from civil liability, *see, e.g., Scheuer* v. *Rhodes,* 416 U.S. 232 (1974) (state executive officers); *Imbler* v. *Pachtman,* 424 U.S. 409 (1976) (state prosecutors), and it is also clear that in establishing this principle

> the Court has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens....

Doe v. *McMillan,* 412 U.S. 306, 320 (1973). If official immunity applies it "might not be the same for all officials for all purposes," and it applies to all "government officials of suitable rank." *Id.* at 319-20.

Civil official immunity is based on the principle that public officials—regardless of the particular arm of Government in which they serve—should be free from vexatious civil litigation in the performance of their official duties. *Doe* v. *McMillan, supra.* Legislators should of course be free from interference from many civil lawsuits; it would be patently absurd to permit civil actions against legislators on the basis of their vote on a particular matter.[14] However, with respect to legislators, a separate and distinct principle is involved.

[14] Or against judges for their decisions in particular cases, or against prosecutors for bringing certain cases.

As we have discussed previously, the rights of state legislators are derived from the nature of the legislature as an institution. In *Tenney* this Court was not primarily concerned with the interference of vexatious litigation or "the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities." *Barr* v. *Matteo,* 360 U.S. 564, 565 (1959); *Doe* v. *McMillan,* 412 U.S. at 319.[15] It could not be more clear from *Tenney* that the principal concern was whether our federal common law protects the state legislature itself as a political institution, so that this body might "support the rights of the people, by enabling their representatives to execute the functions of their office *without fear of prosecutions,* civil or criminal." 341 U.S. at 373-74, citing *Coffin* v. *Coffin,* 4 Mass. 1, 27, 3 Am. Dec. 189 (1808) (Emphasis added). Vexatious claims and rights of claimants which justify official immunity pale beside the important principles of the legislative speech or debate principle. *See Tenney, supra; Doe* v. *McMillan,* 412 U.S. at 324. (When defining official immunity

[15] The Government has not cited nor have we found any case which actually applies "official immunity" to a legislator. *See, e.g., Nixon* v. *Sirica,* 487 F.2d 700, 713 (D.C. Cir. 1973), *aff'd.,* 418 U.S. 683 (1974) (Presidential privilege); *United States* v. *Isaacs,* 493 F.2d 1124, 1144 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974) (Governor and State Director of Revenue); *United States* v. *Anzelmo,* 319 F. Supp. 1106 (E.D. La. 1970) (State Attorney General); *O'Shea* v. *Littleton,* 414 U.S. 488, 503 (1974) (Magistrate of the County Court of Alexandria County, Illinois). In *Doe* v. *McMillan,* the legislators were all dismissed on the basis of the Speech or Debate Clause, and not on official immunity. 412 U.S. at 317-318. In *Tenney* there is no express reference to 'official immunity."

for a federal legislative employee, "[t]he scope of inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same.") *Cf. Barr* v. *Matteo,* 360 U.S. at 569 (although official immunity "has in large part been of judicial making, . . . the Constitution itself gives an absolute privilege to members of both Houses of Congress.")

Legislators do indeed have rights akin to official immunity, but they flow from a deeper source, and this deeper source has always recognized the need to protect a legislator against criminal prosecutions. Indeed, this common law principle will be drained of its meaning if it is restricted to the role of providing nothing more than a barrier to private suits by individuals.

(2) Separation of Powers.

As noted, the Government also contends that the separation of powers doctrine is the sole purpose for the Speech or Debate Clause and that this doctrine does not "support the recognition of a federal evidentiary privilege on behalf of state Senators." (Pet. Br. at 40-44)

Respondent certainly agrees that the Speech or Debate Clause is one of the checks and balances incorporated into the Constitution, and that it does in fact "preserve the constitutional structure of separate, coequal, and independent branches of government." *United States* v. *Helstoski, supra* at 13. However, separation of powers is neither the sole nor the "seminal" reason for the rule, and it obviously has no application in this case.

Irrespective of any check or balance, "throughout United States history, the privilege has been recog-

nized as an important protection of the independence and integrity of the legislature" to protect the legislature from the use of "criminal and civil law to suppress and intimidate critical legislation." *United States* v. *Johnson,* 383 U.S. at 178. Reason and experience have shown that the necessity for protection of the legislature stands by itself as sufficient justification for the rule; even though "[i]n the American government structure the clause serves the *additional function* of reinforcing the separation of powers so deliberately established by the Founders." *Id.* (emphasis added).

There is even a greater need for the privilege in prosecutions of state legislators by the federal government. Coordinate branches of the state or federal governments exercise their respective check on the other coordinate branches, since "[t]he Legislative Branch is not without weapons of its own and would no doubt use them if it thought the Executive were unjustly harassing one of its members." *Brewster,* 408 U.S. at 522 n. 16; *Gillock, supra.* Here, there is no check that state legislators may exercise when "the federal government as a whole is acting to punish an individual state legislator. . . ." (Pet. Br. at 14). *See Gillock,* 587 F.2d at 286. Surely reason and experience teach that the mere threat of this vast power, much less its exercise, will cause legislators to cower and refrain from the free and lively debates and actions which are envisioned in our scheme of government. And if the federal government does act, then this intrusion into the state legislature disturbs and threatens the balance of power within the state system.

For a state legislator, the lack of appropriate checks against the federal executive presents a much closer

analogy to the considerations which gave birth to the privilege in England. This privilege arose to protect members of Parliament who, like state legislators, had no other means of responding to "a hostile executive," be it the King or the federal government, *see Tenney* v. *Brandhove,* 341 U.S. at 372-74; *United States* v. *Johnson,* 383 U.S. at 178-79; *United States* v. *Brewster,* 408 U.S. at 507-09, and it is essential so that legislators may "execute the functions of their office without fear of prosecutions, *civil or criminal.*" *Tenney* v. *Brandhove,* 341 U.S. at 374 (emphasis added).

Finally, it would appear sufficient, in answer to the Government's argument that the absence of a separation of powers basis destroys a state legislator's speech or debate protection, to observe that the speech or debate protection upheld in *Tenney* and *Lake Country Estates* likewise had no basis in the separation of powers doctrine.

(3) The Common Law Does Not Reflect A "Measured Hostility" Towards Privileges.

We do not quarrel with the general proposition that a privilege precludes the use of obviously telling evidnce and that this may be important evidence for a decision by a fact finder in any particular case. It is beyond question that if privileges applied only to irrelevant evidence this Court would have little cause to consider such issues. However, the degree to which such evidence is excluded depends in part on the nature of the proceeding; *see* Note 12, *supra,* and is permitted when there is "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Elkins* v. *United States,*

364 U.S. 206, 234 (1960) (Frankfurter, J. dissenting). Therefore, it is inaccurate to suggest a "measured hostility" toward privileges unless there is a hostility toward the public good. We advance a simple argument in this case: the public good is best served by the recognition of a common law legislative privilege in criminal proceedings. The rationale for excluding the evidence is strongest where the admission of evidence might result in the imposition of a criminal sentence, *see United States* v. *Calandra,* 414 U.S. at 348, *Tenney* v. *Brandhove, supra,* and the exclusion of evidence of a state legislator's legislative acts is supported by four hundred years of reason and experience.

C. The conclusion must be drawn that the common law recognizes the speech or debate protection.

Accordingly, it is respectfully submitted that the decisions of this Court, as well as their historical antecedents, establish the existence of a speech or debate protection, and the principles underlying it are cognizable under Rule 501, Federal Rules of Evidence. It is further submitted that the Government's arguments in opposition to this well-entrenched legislative protection are logically unsound, but, more importantly, are directly contrary to the applicable decisional law. Simply stated, a refusal to recognize the fundamental legislative guarantee asserted in the case at bar would require this Court to turn its back on over four hundred years of Anglo-American history and an unbroken line of well-reasoned decisions upholding that protection. The significant issue presented for review in this case is not whether the speech or debate protection is recognized by the federal common law, but whether the speech or debate principle, "in light of

reason and experience," is somehow rendered inapplicable to state legislators in federal criminal prosecutions, although fully applicable to state legislators in federal civil cases. Although the unquestioning acceptance of speech or debate protection is some evidence of "reason and experience," there is additional support within the context of Rule 501 of the Federal Rules of Evidence and the similarity between state and federal legislators, each operating with their own sovereign government.

D. The federal common law speech or debate protection must be applied, through rule 501, in a federal criminal proceeding against a state legislator.

In determining whether there is any adequate basis for excluding state legislators in federal criminal proceedings from the protection of the common law speech or debate guarantee, it must be recognized at the outset that such an exclusion would be the only exception to application of that protection that this Court has ever made.

As noted above, the speech or debate protection has been applied, as to federal legislators under the Speech or Debate Clause, in both civil cases, *see, e.g., Eastland* v. *United States Servicemen's Fund, supra,* and criminal cases, *see, e.g., United States* v. *Helstoski, supra,* and, as to state legislators, and even "regional legislators," under federal common law, in civil cases, *Tenney* v. *Brandhove, supra; Lake Country Estates* v. *Tahoe Regional Planning Agency, supra.* Not only was the protection applied in those cases, it was applied broadly and with flexibility to accomplish the purposes underlying that protection. Thus, the protection was held to even bar part of one count of an indictment

in *United States* v. *Johnson,* since legislative acts constituted a necessary element of the charge contained in that count; but, in *Helstoski,* dismissal of charges was not necessary to preserve the Speech or Debate Clause principles and the protection was applied solely to exclude evidence of that federal legislator's legislative acts, in accord with the decisions in *United States* v. *Johnson, supra,* and *United States* v. *Brewster, supra.* It is this latter application, of course, that was upheld in the case at bar.

If the Court is to carve out an exception for state legislators in criminal cases, it could only be based on a determination that "[t]he scope of the privilege is limited by its underlying purpose." *Roviaro* v. *United States,* 353 U.S. at 60. And there must be a compelling reason, present in the instant situation, but absent in the above-cited situations, which requires that the balance here be struck wholly in favor of federal prosecution and wholly against the need for independence in the legislative houses of the States. The Government has brought forth no such reason and respondent respectfully submits that there is none, for it is manifestly clear that the principles underlying application of the speech or debate protection in all other situations are brought to bear with equal force here, and that the reason for the privilege in the first instance was to avoid criminal charges based on legislative acts.

The Government contends that the Speech or Debate Clause is fundamentally different from our federal common law claim, and that even if there is a common law criminal immunity for state legislators for their "direct civil and criminal liability for [their] legislative acts," it should not extend to the exclusion of

"corroborative evidence." (Pet. Br. at 39-40). Similar claims have been rejected in cases involving the Speech or Debate Clause, *see Helstoski, supra; Brewster, supra; Johnson, supra;* and there is no plausible rationale for stripping the common law speech or debate principle of the only meaningful protection which can be asserted. The federal clause is expressive of and codifies the federal common law, *see e.g., Miranda* v. *Arizona,* 384 U.S. at 442; and in a similar instance this Court acknowledged this close relationship:

> In *Tenney* v. *Brandhove* at issue was whether legislative privilege protected a member of the California Legislature. . . . The Court held a dismissal of the suit proper; it viewed *the state legislative privilege as being on a parity with the similar federal privilege.* . . .

United States v. *Johnson, supra* at 179-80 (emphasis added);[16] *see Lake Country Estates,* 59 L.Ed2d at 413 (the principle behind the privilege "is equally applicable to federal, state, and regional legislators."); *Imbler* v. *Pachtman,* 424 U.S. at 419 n. 15.

The admission of legislative acts as "corroborative evidence" renders the speech or debate principle meaningless, since there would be few if any prosecutions in which an imaginative prosecutor could not engineer the admissibility of legislative acts. Moreover, a similar argument was expressly rejected in *United States* v. *Helstoski, supra.* The only meaningful way to preserve

---

[16] The "state legislative privilege" referred to in *Johnson* is not the federal privilege, nor could it have conceivably been a California state constitutional privilege, since California had no such provision. *Cf. Tenney,* 341 U.S. at 375.

the purpose of the speech or debate principle is to follow the precedent decided under the federal clause.

The historical development of the speech or debate principle does not distinguish between state or federal legislators; indeed, it prompts the conclusion that there should be no such distinction in the instant context. History demonstrates without contradiction that a limited evidentiary privilege, excluding evidence of legislative acts, is a reasonable accommodation between the requirements of legislative freedom and the interest of our society in prosecuting allegedly corrupt legislators.

Although the Government seeks to exaggerate the protection into gargantuan proportions, the better to attack it, the Court of Appeals held that the recognition of this common law speech or debate principle does not preclude prosecution of state legislators, but only that it affords a very narrow evidentiary privilege. The scope of the privilege is limited: it can be waived, *Craig I, supra; Craig II, supra;* it does not grant immunity to prosecution, *Brewster,* 408 U.S. at 515-17; and it only applies to acts associated with the legislative office, *id.; United States* v. *Johnson, supra.* Although the privilege "precludes any showing of how [a legislator] acted, voted or decided," *United States* v. *Brewster, supra* at 527, "an inquiry into the purpose of a bribe 'does not draw into question the legislative acts of the defendant member of Congress or his motives for performing them.' " *Id.* at 526 (citation omitted). *See United States* v. *Helstoski, supra.* Moreover, the Courts have even recognized that actions taken under color of legislative authority may not be privileged if the action is not legislative, *i.e.,* if the legislator is performing an executive or judicial function. *Tenney,*

341 U.S. at 378. In short, the federal government is not precluded in any sense from prosecuting; it must however restrict its proof to exclude "legislative acts." In other words, a delicate balance is struck which recognizes the competing interests; and the costs of protection for each respective interest is not too dear. If it appears that the federal government *can* (whether or not it will) use its criminal laws either punitively or negligently, then good men and women, who at personal sacrifice are not only willing to serve, but also willing to take the unpopular side of an argument, will be discouraged and lost from our system.

Reason and experience illustrate the error in the Government's factual assumption that when "the federal government as a whole is acting to punish an individual state legislator for a violation of federal law" (Pet. Br. at 14) and legislative acts are used in the prosecution "there is no significant likelihood that federal prosecutions will chill legitimate legislative activities." (Pet. Br. at 50). We simply ask this Court to consider not only "what has been, but . . . what may be." *Weems* v. *United States,* 217 U.S. 349, 373 (1910).

As the Court of Appeals pointed out, "[i]t is easy to conceive of the abuse of federal prosecutorial power against members of state legislatures of an opposite political persuasion," *Gillock,* 587 F.2d at 286. In the course of state legislative activities state legislators may justifiably provoke the ire of the federal government. If there is no check on the federal power other than the ultimate judgment of twelve jurors, the state legislator could be theoretically prosecuted and tried for the simple act of voting on a specific piece of legis-

lation."[17] The Government admits that "irresponsible federal prosecutors could file politically motivated charges against state legislators," but points to the lack of a "history of such abuses." (Pet. Br. at 37) For centuries it has been well understood that our system requires something more than good faith assurances by the Executive. *Cf. United States* v. *United States District Court,* 407 U.S. 297 (1972). In this situation, that "something more" is the speech or debate principle, and this principle merely sets a limit on the scope of inquiry into legislation and motivation therefor.

Good faith assurances are a dubious basis for an experiment with potentially disasterous effects. The potential damage need not be so dramatic as the change of a legislator's commitment for a particular vote on a

[17] A scenario which could give rise to a prosecution against an unpopular state legislator for purely legislative acts can be hypothesized. Suppose Senator A supports the Equal Rights Amendment, though hesitantly, from its inception and also receives a campaign contribution from a feminist organization. Senator A stands staunchly against a state ceiling on interest rates. Senator B favors a ceiling on interest rates and opposes the Equal Rights Amendment. Senator A and Senator B caucus: they decide that Senator A will vote against the Equal Rights Amendment if Senator B will vote against a ceiling on interest rates. Subsequently, and without solicitation from Senator A, an antifeminist group sends Senator A a campaign contribution. The Senators' fear of a prosecutorial intrusion into this process "could make them wary of making such compromises, and thus, chill a legitimate part of the legislative process." Note, *Evidentiary Implications of the Speech or Debate Clause,* 88 Yale L.J. 1280, 1286-87 n. 30 (1979). Moreover, if evidence of actual votes is permitted, Senator A might reasonably fear that proof of his prior votes in support of the Equal Rights Amendment, the feminist's contribution, the subsequent vote in opposition to the Equal Rights Amendment and the following campaign contribution "might form a chain of circumstantial evidence sufficient to ground a bribery prosecution." *Id.*

particular matter; it can be the insidious decline of the legislature as a separate and valuable arm of government. It is this creeping damage which can be caused by the hesitancy of individual legislators to act freely; and it will almost certainly result if there is unfettered discretion in the federal government to bring its awesome power to bear on any particular state legislator. *Cf. Boyd* v. *United States,* 116 U.S. 616, 635 (1886) ("It may be that it is the obnoxious thing in its mildest and lease repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure.").

We submit that the federal and state principles are congruent. They each share the common genesis of a necessity to protect legislators from intimidation for actions taken in the course of their legislative function. A limited evidentiary privilege which excludes evidence of legislative acts, *United States* v. *Brewster,* 408 U.S. at 528, provides the only meaningful protection of the speech or debate principle, and the only certain device, to paraphrase *Brewster,* to apply the principle so as to insure the independence of the legislature without altering the historic balance of the federal/state relationship.

For these reasons, and the absence of countervailing reasons, it must be concluded that the federal common law speech or debate protection must be applied to this state legislator in this federal criminal proceeding and, as applied, requires the exclusion, under Rule 501, of those items of evidence found by the Court of Appeals to constitute legislative acts of the respondent.

2. Principles and Considerations Deeply Rooted In The Anglo-American Form Of Representative Democracy, The Concept Of Federalism, And In The Constitution, Require Recognition And Application Of The Speech Or Debate Protection In A Federal Criminal Prosecution Of A State Legislator.

There are certain principles and concepts which go to the very heart of the American democratic form of government. These principles and concepts found their way into the very choices made by the founding fathers when they shaped the Government we enjoy, and include the principle that there should be a division of sovereign power between the national government and the governments of the several states. Within each of these separate sovereigns is the "unique historical position" of this legislative protection, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 59 L.Ed.2d at 411 n. 24, *citing* Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1200 (1977), which requires an equally unique appreciation of its operation in this case. In short, the protection is so fundamental that it would be applicable even in the absence of Rule 501.

Lake Country Estates, which was decided after the Court of Appeals decided the instant case, recognizes and underscores the fundamental nature of the speech or debate protection. In rejecting petitioner's argument that legislative immunity should be limited to the federal and state level (and not applied to "regional legislators"), this Court first observed the historical roots of the legislative protection, saying,

> such immunity was consistently recognized in the common law and was taken *as a matter of course by our Nation's founders.*

Id. at 411 (emphasis added). Recalling the decision in *Tenney* v. *Brandhove,* 341 U.S. at 376, this Court said it

> reasoned that Congress, in enacting § 1983 as part of the Civil Rights Act of 1871, could not have intended to "overturn the *tradition of legislative freedom* achieved in England by Civil War and *carefully preserved* in the *formation of State and National Governments here.*"

Id. (emphasis added). Thus, this Court has recently confirmed the essence of our argument that the principles asserted herein are so fundamental that they underlie the Constitution itself and the very formation of American government. Consequently, as this Court further held, the protection does not owe its existence to any particular constitutional provision, statute, or rule; it is necessary for the public welfare. *Id.* at 412. Significantly, Lake Country Estates, the petitioner, had argued that the legislative immunity source was found in constitutional provisions, such as the Speech or Debate Clause, which had no application to "regional legislators;" and this Court's rejection of that argument is of seminal importance in the case at bar.

> We find these arguments unpersuasive. The Speech and Debate Clause of the United States Constitution is no more applicable to the members of state legislatures than to the members of TRPA. The States are of course free to adopt similar clauses in their own Constitutions, and many have in fact done so. These clauses reflect the central importance attached to legislative freedom in our Nation. But the absolute immunity for state legislators recognized in Tenney reflected the Court's interpretation of federal law; *the decision did not depend on the presence of a Speech or Debate Clause in the Constitution of any State, or on any particular set of state rules or procedures avail-*

> *able to discipline erring legislators. Rather, the rule of that case recognizes the need for immunity to protect the "public good."*

Id. at 412 (emphasis added).

In the instant case, as in *Lake Country Estates,* it must be recognized that the legislative protection at issue is necessary for the public good, for reasons which go far beyond the strait-jacketed inquiry proposed by the Government. Respondent finds support for this concededly broad proposition, not only in the foregoing authorities, but in the Guaranty Clause of the Constitution, Article IV, Section 4, and in the Tenth and Eleventh Amendments to the Constitution.

For example, the Guaranty Clause requires that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government. . . ." Since the speech or debate protection is a prerequisite for an effective and independent legislature, the Government's attempt to invade this traditionally protected area would violate the principles underlying this clause and detract from a State's right to enjoy "a Republican Form of Government."

While it is not contended that the Guaranty Clause is a repository of any right asserted by this respondent,[18] it is contended that the guarantee of a Republican Form of Government impacts on the considerations

[18] Respondent is aware of the doctrine, established in *Luther* v. *Borden,* 48 U.S. (7 How.) 1 (1849), that questions presented under this section are nonjusticiable, as "political questions," a doctrine left intact by this Court's reexamination of the "political question" doctrine in *Baker* v. *Carr,* 369 U.S. 186, 218-232 (1962). It is submitted, however, that reliance on the Guaranty Clause in this case clearly raises no political question and may properly be considered for these limited purposes.

at issue in this case and provides support for our argument that reason and experience support a speech or debate principle in criminal trials.

The Tenth and Eleventh Amendments likewise lend support to the overriding character of the speech or debate protection, in that the speech or debate principle is an integral aspect of sovereignty in our form of government, reserved by the Tenth Amendment and preserved, in pertinent part, by the Eleventh Amendment.

The Government's arguments have either ignored or avoided the impact of its position on state sovereignty. However, there is more at stake here than the rights of one legislator or the structural relationship of one coordinate branch of federal government to another. By surrendering its sovereignty to the federal government, each State placed its trust in the federal government and in the assumption that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514, 523 (1926). The overriding principle is that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas* v. *White,* 74 U.S. (7 Wall) 700, 725 (1868). The due functioning of state government requires that our state/federal scheme of government must recognize this separate, "vital consideration,"

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. *Harris*, 401 U.S. 37, 44 (1971); *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

The prosecution in this case is based on federal criminal statutes enacted pursuant to Congress' power to regulate commerce (Pet. Br. at 45); and wholly apart from principles of comity is the issue of whether the commerce power can be construed to limit the traditional freedom of State legislators.[19] The Tenth Amendment prohibits the exercise of Congressional power "in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry* v. *United States*, 421 U.S. 542, 547 n. 7 (1975), and interference with the due functioning of a state's legislature is certainly a factor which "impairs the state's integrity."

The speech or debate principle can only be asserted by a defendant legislator, but it is for the good of the legislature itself, and the legislature is certainly one of of the

> attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

[19] In *Tenney*, the Court recognized that, irrespective of principles of good faith, there is a related issue as to the power of the federal government to restrict the rights of the state legislators: "[l]et us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. *That would be a big assumption.*" 341 U.S. at 376 (emphasis added). *See also Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency*, 59 L.Ed.2d at 415 (Blackmun J., dissenting in part).

National League of Cities v. *Usery*, 426 U.S. at 845.[20] Thus, the Tenth Amendment implies a healthy respect for the integrity of state institutions; and despite the affirmative grant of the commerce power, the federal government cannot destroy one of the "attributes of sovereignty" by denying speech or debate protection. Consequently, the Supremacy Clause does not require, under these circumstances, that a State speech or debate protection fall before the federal criminal statutes.

Accordingly, these foregoing policies, principles and considerations, wholly apart from and in addition to those principles which govern this Court's inquiry under Rule 501, require both that this Court recognize and confirm the existence of a speech or debate protection for state legislators in federal criminal cases and that it apply that protection in the instant case so as to exclude from evidence at trial the legislative acts of the respondent, thus affirming the decision of the United States Court of Appeals for the Sixth Circuit.

[20] Moreover, if the legislative branch of the federal government has "traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States," so that it "will not be deemed to have significantly changed the federal-state balance," *United States* v. *Bass*, 404 U.S. 336, 349 (1971), then surely the executive branch should be restrained from prosecuting an action which would utilize evidence which the state could not use, and which the Government could not use if a Federal legislator were being tried. *See Mapp* v. *Ohio*, 367 U.S. at 658 (state and federal governments should "respect the same fundamental criteria in their approaches.").

CONCLUSION

This decision of the Court of Appeals is correct and should be affirmed.

Respectfully submitted,

JAMES F. NEAL
JAMES V. DORAMUS
JAMES F. SANDERS
NEAL & HARWELL
800 Third National Bank Bldg.
Nashville, TN 37219

HAL GERBER
GERBER, BERNSTEIN, GERBER & WINESTONE
3121 100 North Main Bldg.
Memphis, TN 38103

Counsel for Respondent